

1
2 **UNITED STATES DISTRICT COURT**
3 **DISTRICT OF NEVADA**

4 * * *

5 NICOLE MCMILLEN,

6 Plaintiff,

7 v.

8 LAS VEGAS TOWNSHIP CONSTABLE'S
9 OFFICE, a political subdivision of the State
10 of Nevada; JOHN BONAVENTURA, Las
11 Vegas Township Constable, personally and
12 in his official capacity; DEPUTY
CONSTABLE BRYAN CORNELL,
personally and in his official capacity; and
DEPUTY DOES 1-100, personally and in
their official capacities,

13 Defendants.
14

Case No. 2:14-cv-00780-APG-NJK

PRELIMINARY INJUNCTION

15 **I. BACKGROUND**

16 Plaintiff Nicole McMillen was in the process of relocating to Las Vegas.¹ The
17 Constable's Office apparently received a call-in complaint that Ms. McMillen had not registered
18 her vehicle in Nevada as required by NRS § 482.385 (the "Fair Share Program"). (Dkt. #17-1 at
19 11:4-9.) After investigating the allegation, the Constable's Office sent a letter to Ms. McMillen
20 stating that she had been issued a citation for violation of that statute. (Dkt. #9-3.) The letter
21 informed Ms. McMillen that she could avoid having charges filed against her by, among other
22 things, registering her car and paying "the required \$100.00 fee to the Las Vegas Township
23 Constable's Office in accordance with NRS 258.070.2."² (*Id.*) At the bottom of the letter, in bold

24
25 ¹ It is unclear whether Ms. McMillen was still a resident of Utah or had completed her
26 move to Las Vegas at the time of the events giving rise to this lawsuit. For purposes of this
Preliminary Injunction, it is irrelevant.

27 ² The notice refers to the wrong statutory section. The proper citation is to NRS
28 § 258.070(3).

1 and all capital letters, Ms. McMillen was informed as follows: **“PER NRS 258.070.2, YOU ARE**
 2 **RESPONSIBLE FOR THE \$100 FEE REGARDLESS OF JUDICIAL ADJUDICATION.**
 3 **AFTER 30 DAYS IF YOU FAIL TO PAY THE \$100 FEE YOUR INFORMATION WILL**
 4 **BE FORWARDED TO COLLECTIONS.”** (*Id.*)

5 Ms. McMillen disputes the validity of the \$100.00 Constable Fee. She faces the imminent
 6 threat of criminal prosecution and civil collection efforts because she refuses to pay. Because
 7 (1) the Constable Fee is charged regardless of whether NRS § 482.385 has been violated, (2) the
 8 Nevada statutes provide no ability to challenge that fee, and (3) it appears no court has
 9 jurisdiction to hear a challenge to the fee, NRS § 258.070(3) appears to violate Ms. McMillen’s
 10 rights to due process. Therefore, I preliminarily enjoin the enforcement and collection of the
 11 \$100.00 Constable Fee under NRS § 258.070(3).
 12

13 II. ANALYSIS

14 Defendants argue that I should deny Ms. McMillen’s request for injunctive relief and
 15 abstain from deciding this case based on *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger*
 16 abstention doctrine counsels federal courts to abstain from interfering with ongoing state court
 17 proceedings in certain circumstances.

18 Before *Younger* abstention can be applied to dismiss a federal claim, three
 19 requirements must be met: (1) there must be ongoing state judicial proceedings,
 20 (2) the state judicial proceedings must implicate important state interests, and (3)
 21 the state judicial proceedings must afford the federal plaintiff an adequate
 opportunity to raise constitutional claims. . . . All three elements of *Younger* must
 be present in order for abstention to be appropriate.³

22 As discussed below, there are no ongoing state judicial proceedings which afford Ms. McMillen
 23 an adequate opportunity to raise her constitutional claims. Thus, the *Younger* abstention doctrine
 24 does not apply here.
 25
 26

27 ³ *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1001 (9th Cir. 1995) (internal
 28 quotation marks and citation omitted).

1 A. Preliminary Injunction

2 “A plaintiff seeking a preliminary injunction must establish that he is likely to
3 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
4 preliminary relief, that the balance of equities tips in his favor, and that an
5 injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632
6 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council*, 555
7 U.S. 7, 20 (2008)). We evaluate these factors via a “sliding scale approach,” such
8 that “‘serious questions going to the merits’ and a balance of hardships that tips
9 sharply towards the plaintiff can support issuance of a preliminary injunction, so
10 long as the plaintiff also shows that there is a likelihood of irreparable injury and
11 that the injunction is in the public interest.” *Id.* at 1131, 1135.⁴

12 The Supreme Court elaborated on courts’ duties when considering injunctive relief:

13 A preliminary injunction is an extraordinary remedy never awarded as of right. . . .
14 In each case, the courts must balance the competing claims of injury and must
15 consider the effect on each party of the granting or withholding of the requested
16 relief. . . . In exercising their sound discretion, courts of equity should pay
17 particular regard for the public consequences in employing the extraordinary
18 remedy of injunction.⁵

19 These factors favor entry of an injunction in this case.

20 1. Likelihood of Success on the Merits

21 McMillen has established a likelihood of success on her Section 1983 claim that NRS
22 § 258.070(3) violates her right to procedural due process. “Constitutional principles protect
23 against monetary injuries large and small.”⁶ In *Trimble*, the Ninth Circuit held that imposition of
24 a \$25.00 “processing fee” for a traffic ticket violated the defendant’s Equal Protection rights
25 because it was imposed on some defendants but not on others. *Id.* The court treated the \$25.00
26 fee as part of the defendant’s punishment because it was charged only if it was determined that
27 she violated the law. 487 F.3d at 754, n. 2 (citing *United States v. Smith*, 818 F.2d 687, 690 (9th
28 Cir.1987) (“A punitive measure designed to raise revenue is still a punitive measure.”)). Here,
29 Ms. McMillen is forced to pay the \$100.00 Constable’s Fee even if she did not violate any law.

30 ⁴ *Arc of Cal. v. Douglas*, -- F.3d --, 2014 WL 2922662 at *6 (9th Cir. June 30, 2014).

31 ⁵ *Winter*, 555 U.S. at 24 (internal quotation marks and citations omitted).

32 ⁶ *United States v. Trimble*, 487 F.3d 752, 753 (9th Cir. 2007).

1 While the requirements of “due process [are] flexible and call[] for such procedural
 2 protections as the particular situation demands,”⁷ the “essential requirements of due process . . .
 3 are notice and an opportunity to respond” at a hearing of some sort.⁸ “The fundamental
 4 requirement of due process is the opportunity to be heard at a meaningful time and in a
 5 meaningful manner.”¹⁰ The Supreme Court “has traditionally insisted that, whatever its form,
 6 opportunity for that hearing must be provided before the deprivation at issue takes effect.”¹¹ The
 7 government violates procedural due process where it denies a hearing to defendants, even for
 8 traffic or parking infractions.¹²

9 Here, neither the statute nor the state court system offers any opportunity to challenge the
 10 Constable Fee, either before or after it is levied. Apparently, the Las Vegas Justice Court has
 11 jurisdiction over vehicle registration citations issued by the Constable’s Office. (Dkt. #9-3.)
 12 However, the Chief Justice of the Peace for that court has instructed all Traffic Referees that the
 13 Justice Court has no jurisdiction over the Constable’s Fee.

14 Under this statute, the Constable’s Office is allowed to charge and collect a fee of
 15 \$100.00 with respect to violations of vehicle-registration requirements. This fee is
 16 to be “retained by the Constable as compensation,” ***regardless of the disposition of***
 17 ***the underlying case in Justice Court.*** Therefore, whenever you are sitting in
 Traffic Court or presiding over a bulk session or attorney session, please do not
 indicate to attorneys or defendants that the \$100.00 Constable fee is “waived.”

18 Staff in the Traffic Division will also be advised that the \$100.00 fee for the
 19 Constable’s Office is separate and apart from the fines and fees imposed by the
 Las Vegas Justice Court.¹³

21 ⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

22 ⁸ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

23 ¹⁰ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted); *see*
 24 *also Villa-Anguiano v. Holder*, 727 F.3d 873, 881 (9th Cir. 2013).

25 ¹¹ *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

26 ¹² *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977).

27 ¹³ (Dkt. #17-2 at pp. 2–3 (emphasis added)).

Thus, the Justice Court will not hear a challenge to the Constable's Fee, and that fee must be paid even if the defendant is found not to have violated the Fair Share Program. Apparently, even if the Constable's Office issued citations to non-violators simply to generate revenue for itself, no mechanism exists to challenge that action. The fundamental requirement of procedural due process requires more. Ms. McMillen has demonstrated a likelihood of success on the merits of her Section 1983 claims for violations of procedural due process, thereby satisfying the first requirement for issuance of a preliminary injunction.

2. Irreparable Harm

Irreparable harm is established if the "remedies available at law, such as monetary damages, are inadequate to compensate for the injury."¹⁴ "[A]n alleged constitutional infringement will often alone constitute irreparable harm."¹⁵ Because Ms. McMillen has established that her constitutional rights are in jeopardy, she has proven that she is likely to suffer irreparable harm in the absence of injunctive relief. Moreover, if Ms. McMillen does not pay the Constable Fee, she faces criminal prosecution and a civil collection action. (Dkt. #9-3.) That threat, and the resulting stigma and negative credit ratings, constitute irreparable harm.

3. Balancing of the Equities

The harm to Ms. McMillen in enforcement of the Constable's Fee is the infringement of her constitutional right to due process. The only harm to the defendants from an improperly-

¹⁴ *Herb Reed Enters., LLC v. Fl. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013).

¹⁵ *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (citing *Associated General Contractors v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir.1991)); see also *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F.Supp.2d 446, 470-471 (N.D.Tex. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary. . . . Additionally, irreparable harm may result if enforcement of an ordinance would yield fines and criminal penalties."); *Pure Wafer, Inc. v. City of Prescott*, CV-13-08236-PCT-JAT, 2014 WL 1515143 (D. Ariz. Apr. 17, 2014) ("If the Ordinance is enforced against Pure Wafer, Pure Wafer will be forced to choose between asserting its valid rights under the Agreement and facing fines and criminal prosecution for noncompliance with the Ordinance. Pure Wafer has shown that enforcement of the Ordinance will cause irreparable harm for which no amount of monetary damages can adequately compensate.").

1 entered injunction is the delay in collecting the \$100.00 Constable's Fee. The balance of the
2 equities tips sharply in favor of Ms. McMillen.

3 **4. Public Interest**

4 The public has an interest in ensuring that citizens are not fined without due process of
5 law. Thus, the public interest favors issuance of this injunction.

6 **5. Bond**

7 Federal Rule of Civil Procedure 65(c) requires that Ms. McMillen provide "security in an
8 amount that the court considers proper to pay the costs and damages sustained by any party found
9 to have been wrongfully enjoined or restrained." Given that I am only restraining collection of
10 the \$100.00 Constable's Fee, a \$100.00 bond is appropriate.

11 Based on the foregoing, Ms. McMillen has satisfied the standards for issuance of a
12 preliminary injunction barring the Constable's Office from collecting the \$100 Constable's Fee
13 under NRS § 258.070(3).

14 **III. CONCLUSION**

15 Based on the foregoing, IT IS HEREBY ORDERED:

16 The Las Vegas Township Constable's Office is preliminarily enjoined from collecting,
17 attempting to collect, or taking any steps to enforce the \$100.00 fee set forth in NRS
18 § 258.070(3). The Las Vegas Township Constable's Office is also preliminarily enjoined from
19 instituting or continuing any criminal, civil, administrative, or other legal action against Ms.
20 McMillen to collect or enforce that \$100.00 fee.

21 DATED THIS 8th day of July, 2014 *nunc pro tunc* to June 18, 2014.
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23 
24 _____
25 ANDREW P. GORDON
26 UNITED STATES DISTRICT JUDGE
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